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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SHAWN BAILEY, Defendant and Appellant.	B262246 (Los Angeles County Super. Ct. No. NA099755)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Vacated in part, remanded with directions in part, affirmed in part.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Shawn Bailey appeals from the judgment entered following a jury trial that resulted in his conviction of two counts of sodomy by force (Pen. Code, § 286, subd. (c)(2); counts 1 & 2);[1] sexual penetration by a foreign object (§ 289, subd. (a)(1); count 3); forcible oral copulation (§ 288a, subd. (c)(2); count 4); forcible rape (§ 261, subd. (a)(2); count 5); and first degree residential robbery (§ 211; count 6). The crimes were committed against two victims. The count 1 sodomy was committed against Sara S. The count 2 sodomy and all other offenses were committed against L.S.

The jury found true numerous allegations under the One Strike law (§ 667.61). The jury found true allegations as to counts 1 and 2 that defendant committed the offenses against more than one victim within the meaning of section 667.61, subdivisions (a) and (e) and kidnapped both victims within the meaning of subdivisions (a) and (e)(1). The jury also found true allegations as to counts 1 through 5 that defendant kidnapped both victims within the meaning of section 667.61, subdivisions (a) and (d). With respect to the counts 2 through 5 sex offenses against L.S., the jury found true the allegations that defendant committed a residential burglary with the intent to commit sex crimes within the meaning of section 667.61, subdivisions (a) and (e), and tied and bound the victim within the meaning of section 667.61, subdivisions (a) and (e), and also found true the allegations that defendant inflicted great bodily injury within the meaning of section 12022.8. The jury separately found true the allegation that defendant personally inflicted great bodily injury in the commission of the robbery within the meaning of section 12022.7, subdivision (a).

The trial court sentenced defendant to a total term of 154 years to life in state prison, consisting of consecutive terms of 25 years to life for counts 1 through 5 plus the high term of six years for the count 6 robbery conviction. The court added five-year terms for infliction of great bodily injury to the counts 2 though 5 terms pursuant to

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[1] All statutory references are to the Penal Code.

section 12022.8 and a three-year term for infliction of great bodily injury to the count 6 robbery pursuant to section 12022.7.

Defendant's contentions on appeal all relate to sentencing allegations. He contends there is insufficient evidence to support the finding that he kidnapped Sara within the meaning of section 667.61, subdivision (d)(2), because Sara consented to the movement. Defendant further contends even if the evidence is sufficient to support the kidnapping allegation, it still must be reversed because the trial court erred in failing to instruct the jury on the requirement that the movement of the victim "substantially" increased the risk of harm inherent in the sodomy. Defendant also contends, and respondent concedes, that section 667.61, subdivision (g) did not authorize the imposition of consecutive 25-year-to-life terms for the counts 2, 3, 4 and 5 offenses against L.S. Defendant further contends he was denied his right to a jury trial on the section 667.61, subdivision (g) sentencing circumstance. Defendant additionally contends the evidence shows he inflicted great bodily injury on L.S. before and during the commission of the sex offenses, but not during the robbery and so the true finding on the section 12022.7 great bodily injury enhancement to the robbery must be reversed. He further contends even if the evidence is sufficient to support the section 12022.7 allegation, it must be stayed pursuant to section 654 because the infliction of great bodily injury was part of a continuous course of conduct which included the beatings during the sex offenses.

Only one 25-year-to life term could properly be imposed against defendant for the counts 2 through 5 offenses. We order the 25-year-to-life terms imposed on those four counts vacated and the matter remanded to the trial court to determine on which single count to impose the 25-year-to-life term and then to resentence defendant on the remaining three counts as authorized under any other law. Accordingly, we need not and do not reach defendant's claim that he has a right to a jury trial to determine if he committed the crimes against L.S. under circumstances which would support consecutive 25-year-to-life sentences.

We affirm the judgment in all other respects. There is substantial evidence that Sara did not consent to be driven to a dark secluded parking lot under a freeway and so

there is sufficient evidence to support the jury's true finding on the section 667.61, subdivision (d)(2), sentencing allegation. Defendant did not contest the substantial increase in the risk of harm element of that allegation and so any omission of that element in the jury instructions is harmless beyond a reasonable doubt. There is substantial evidence showing that defendant inflicted distinct great bodily injury on L.S. during the robbery in addition to that inflicted during the sex offenses. His assaultive conduct was not continuous, and section 654 does not bar sentence on the section 12022.7 allegation.

FACTS

A. Prosecution Evidence

1. Sara (count 1)

On July 27, 2002, about 9:30 p.m., Sara was with friends outside a restaurant/bar on the Pacific Coast Highway in Long Beach. Sara wanted to get something to eat, and one of her friends told her that defendant would give her a ride. Sara and defendant decided to go to Olvera Street in downtown Los Angeles.

Defendant initially drove on the 710 freeway, but soon drove onto an off-ramp. They were less than halfway to their destination. When Sara asked defendant what he was doing, he replied he wanted to get cigarettes. At the bottom of the off-ramp, defendant made a turn and began driving toward a dark secluded area under the freeway. Sara again asked him what he was doing, and he replied "something like shut up, bitch."

Defendant stopped the car and the two fought. Defendant grabbed Sara, turned her around and shoved her face against the car window. He pulled her pants down and inserted his penis into her anus. When he was done, he pushed her out of the car and drove off very quickly.

Sara walked toward the main street. There, a man stopped and gave her a ride to a train station, where an employee called 911. Downey Police Officer Boady Sherman responded to the call. He drove Sara around the area, and she identified a parking lot and building on Imperial Highway near the 710 freeway. He then took her to the hospital.

At the hospital, South Gate Police Officer Art Garcia interviewed Sara. Sara gave him an account of the assault which was largely consistent with her trial testimony. She

stated that defendant drove down Imperial and into a parking lot, then drove to a secluded corner of the parking lot. She told Officer Garcia that "just before they got into the parking lot, she asked [defendant], where the fuck are you going."

Nurse Practitioner Deborah Suyehara conducted a sexual assault examination of Sara. Suyehara found rectal swelling, bruising and an abrasion, which were consistent with Sara's account of being sodomized. Suyehara swabbed the external rectal area to collect any bodily fluids that might have accumulated there.

2. L.S. (counts 2-6)

On September 15, 2002, about 2:30 a.m., L.S. returned to her studio apartment in the Gondolier Motel on the Pacific Coast Highway in Long Beach. As she put her key into her front door lock, she felt a hand on her shoulder and turned around. Defendant hit her in the face and forced her inside her apartment. He ripped the telephone off the wall and tied her up with the cord.

Defendant and L.S. "scuffled" as he dragged her toward the bathroom. L.S. was able to get free, but defendant tied her up again with nylons and a belt. He ripped her clothes off and began sexually assaulting her at the foot of her bed, near the entrance to the bathroom. He penetrated her vaginally, then anally.

At some point, L.S. found herself in the bathroom alone with the door open. She closed it to keep defendant out. She could hear defendant opening doors and "tossing papers and things." Once the noises stopped, L.S. left the bathroom, hoping to escape the apartment and get help. Defendant was still in the apartment. She tried to run past him, but he caught her, tied her up, hit her, and choked her so hard she passed out. When she opened her eyes again, defendant was standing over her. He kicked her in her ribs. She heard the ribs crack. Defendant also hit her with a baseball bat. She passed out again. At some point, she told him that she "had money if he'd just stop and let [her] live." She "was hoping by finding money he would change his state of mind and stop the fighting or hurting [her] more . . . and leave." Defendant ransacked the apartment and eventually found money. At trial, L.S. testified that defendant again penetrated her vaginally and anally and inserted his fingers into her vagina and forced her to orally copulate him.

L.S. was eventually able to crawl out of her apartment and seek help. Someone took her to the hospital. She had a broken arm and ribs, and was hospitalized for a couple of days.

At the hospital, Nurse Practitioner Toyetta Beukes conducted a sexual assault examination of L.S. L.S. stated that she had been sodomized, digitally penetrated, raped and forced to orally copulate an assailant. Beukes observed and photographed bruises on L.S.'s oral palate, face, neck and leg and abrasions on her face, neck and leg. Beukes also swabbed L.S.'s vaginal and rectal areas to collect any bodily fluids that might be there. Beukes opined that L.S.'s injuries were consistent with her account of being sexually assaulted.

Long Beach Police Department Detective Russell Moss interviewed L.S. while she was in the hospital. L.S. told him that the anal penetration occurred next to her bed, and the other three forcible sex acts took place in the bathroom. She also told Detective Moss that she then saw defendant handling a lot of her property and rummaging through her belongings. She twice tried to flee, but defendant caught her both times and punched and kicked her. He also choked her once, causing her to lose consciousness. He took money out of her purse. L.S. admitted to Detective Moss that she had been a prostitute in the past. She did not know defendant, and his attack was not part of a "date" gone bad.

3. Subsequent investigation

In 2006, Long Beach Police Department Detective Luis Galvan took over L.S.'s case. In 2011, he developed some leads in that case, and defendant became a suspect. He reinterviewed L.S., who gave him an account of the sexual assaults which was largely consistent with the accounts she had given to other interviewers. Detective Galvan also took over Sara's case and reinterviewed her. She too gave him an account of the sexual assaults which was largely consistent with the accounts she had given to other interviewers.

Detective Galvan showed Sara a six-pack photographic lineup which included defendant's photo. She did not select defendant. He also showed L.S. a six-pack photographic lineup which included defendant's photo. She did not select defendant.

Sara and L.S. later identified defendant as their attacker at the August 2013 preliminary hearing.

Also in 2011, Los Angeles County Sheriff's Department (LASD) criminalist Gregory Wong analyzed an oral swab from defendant and developed defendant's DNA profile. He compared this profile to the male DNA profile developed from three swabs in L.S.'s sexual assault examination kit, and determined they matched. The odds of an unrelated person having defendant's DNA profile was 1 in 36 quintillion. LASD criminalist Sean Yoshii then compared defendant's DNA profile to the DNA profile developed from swabs in Sara's sexual assault examination kit and determined they matched. The probability that anyone else having defendant's DNA profile was 1 in 36.5 quintillion.

B. Defense Evidence

Defendant testified on his own behalf at trial. He stated that he was a pimp and Sara and L.S. were both prostitutes who had worked for him in 2002. Defendant had never hit or threatened any woman.

Defendant first noticed Sara when she was working on the Pacific Coast Highway. Sara worked for defendant for about three weeks, then disappeared. She was mad at him on the day she disappeared. During the time they were working together they had consensual sex several times.

L.S. worked for defendant for about five weeks beginning in about September, during which time she lived at the Gondolier Motel. They had consensual sex several times during this period. One morning he went by her apartment and learned that she had been beaten and robbed by a client. He offered to take her to the hospital but she wanted money and a ride. When he refused, she became angry. Defendant left on a trip. When he returned, he went to her apartment but saw no sign of her. He did not see her again until he came to court in this matter.

DISCUSSION

A. Sufficient Evidence Supports the Kidnapping Allegation

Although kidnapping under section 667.61, subdivision (d)(2) is a form of aggravated kidnapping, defendant attacks the sufficiency of the evidence to support the kidnapping finding at its most basic level. He contends Sara consented to accompany him and so there is no evidence that he moved Sara by force or fear. He concludes the true finding is not supported by constitutionally substantial evidence.

1. Sufficiency of the evidence review

In evaluating a claim the evidence is insufficient to support a true finding on an allegation, we review the entire record in the light most favorable to the judgment to determine "'whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People* v. *Bolin* (1998) 18 Cal.4th 297, 331.)

2. Role of consent in kidnapping

Kidnapping, with exceptions not relevant here, requires movement of the victim by force or fear. (*People v. Alcala* (1984) 36 Cal.3d 604, 621, overruled on other grounds by *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) The defendant need not use physical force directly against a victim to accomplish a kidnapping. (*Alcala*, at p. 622.) "Imprisonment for any substantial distance in a moving vehicle is forcible asportation." (*Ibid.*)

In some cases, a victim may initially accompany a defendant willingly, but the encounter turns into a kidnapping when the defendant curtails the victim's liberty by force and compels the victim to go with him further. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1017.) "A person . . . can express consent merely by being cooperative in

attitude, but if [the person] exhibited no positive cooperation *even in attitude*, then, despite her passivity, she was not consenting. Kidnapping does not require that the victim express some form of protest or resistance " (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 476-477.)

3. Sara did not agree to accompany defendant to the parking lot

Defendant maintains Sara consented to go with him in his car and did not withdraw her consent until she asked him why they had stopped and he told her to shut up. Defendant argues that since the sexual assault began immediately after the car stopped, there was no forcible movement of Sara in the commission of the assault.

There is no evidence that Sara agreed to go with defendant wherever he went. She testified that she agreed to travel with defendant to Olvera Street to get something to eat. When defendant left the freeway at Imperial, he exceeded the scope of Sara's express consent. Nothing in Sara's behavior once defendant began to exit the freeway shows that she consented to defendant's change of plans.

Sara did not display a cooperative attitude when defendant exited the freeway. She immediately questioned defendant's decision to leave the freeway by asking him what he was doing. When she "felt that the car was going to a secluded dark area," she again asked defendant what he was doing. These questions are as much protests as they are requests for information. Defendant's response showed that he viewed them as protests, telling her, "something about shut up, bitch."

Sara's statements to Officer Garcia, made at the time of the crimes, make her unwillingness to continue travelling with defendant even clearer. She told the officer that "just before they got into the parking lot, she asked [defendant], where the fuck are you going."

Sara consented only to limited movement in defendant's car for a specific purpose. When he deviated from the route to their expected destination, she protested and did not consent to the new route. Defendant continued driving, thereby imprisoning her in his car. Sara could not safely escape from the moving car and so her continued movement is deemed accomplished by fear or force. This is sufficient evidence to support the

kidnapping finding. Since we have determined that "a rational trier of fact could have found the essential elements of the [allegation] proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15 of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

B. Any Omission in the Kidnapping Instruction Was Not Prejudicial

Defendant contends the trial court erred in instructing the jury on the kidnapping circumstance of section 667.61, subdivision (d)(2) using a modified version of CALJIC No. 9.50, the instruction for simple kidnapping, because that instruction did not tell the jury it must determine whether "the movement of the victim *substantially* increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense" as required by section 667.61, subdivision (e)(2). Thus, defendant maintains, the instruction lessened the prosecution's constitutionally mandated burden of proof and compromised his federal constitutional due process rights to a fair and reliable jury determination of the kidnapping sentencing allegation. CALJIC No. 9.50 is not the appropriate instruction for a section 667.61, subdivision (d)(2) allegation, but there was no prejudice to defendant from the instruction.

1. Subdivision (d)(2) requires a substantially increased risk of harm

Respondent contends that the term "substantially" was "arguably" eliminated from section 667.61, subdivision (d)(2) when the Legislature revised section 209 to eliminate the term "substantially" from the offense of kidnapping for purposes of robbery and specified sex offenses. Thus, respondent concludes, the trial court did not err in using an instruction which omits the term "substantially." The Legislature has not expressly or impliedly eliminated this term from section 667.61, subdivision (d)(2).

Prior to 1997, the "substantially" increased risk requirement for section 209 was found in case law only. In 1997, the Legislature amended the Penal Code to move the punishment for kidnapping to commit sex offenses from section 208 to section 209. It placed an expanded list of sex offenses in section 209, subdivision (b)(1) along with kidnapping to commit robbery. The Legislature also added subdivision (b)(2) to section

209. (Stats. 1997, ch. 817, § 2, pp. 5519-5520.) Subdivision (b)(2) provides: "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (Stats. 1997, ch. 817, § 2, pp. 5519-5520.) As our Supreme Court has explained, subdivision (b)(2) "codifies both *People v. Rayford* [(1994)] 9 Cal.4th 1, and a *modified* version of the *People v. Daniels* (1969) 71 Cal.2d 1119 asportation standard." (*People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4, italics added.) "Unlike our decisional authority, it does not require that the movement 'substantially' increase the risk of harm to the victim." (*Ibid*.)[2]

The same bill that added subdivision (b)(2) to section 209 also made minor modifications to section 667.61. (Stats. 1997, ch. 817, § 6, pp. 5576.) None of those changes were to subdivision (d)(2). The bill contains the full text of subdivision (d)(2), including its express requirement that "the movement of the victim substantially increased the risk of harm to the victim." (*Ibid*.)

The bill did have the effect of modifying a different kidnapping sentencing circumstance in section 667.61, however. Subdivision (e)(1) applies to the kidnapping of a victim in violation of certain specified Penal Code sections, including section 209. Because kidnapping under section 667.61,subdivision (e)(1) is defined in part by reference to section 209, the addition of subdivision (b)(2) to section 209 necessarily applied to subdivision (e)(1) as well. Thus, after 1997, subdivision (e)(1), like section 209, requires only an increase in the risk of harm to the victim, not a "substantial" increase.

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[2] The bill also added subdivision (d) to section 209. That subdivision provides: "Subdivision (b) shall not be construed to supersede or affect Section 667.61. A person may be charged with a violation of subdivision (b) and Section 667.61. However, a person may not be punished under subdivision (b) and Section 667.61 for the same act that constitutes a violation of both subdivision (b) and Section 667.61." (Stats. 1997, ch. 817, § 2, p. 5520.) Defendant views this provision as dispositive of respondent's arguments. The language of this subdivision is concerned with pleading issues and double punishment, not substantive changes to kidnapping requirements.

The overall result of the amendment is that, after 1997, section 667.61 recognizes two forms of kidnapping, the first defined internally by section 667.61, subdivision (d)(2) and the second defined externally through subdivision (e)(1)'s reference to other sections of the Penal Code. A kidnapping within the meaning of section 667.61 subdivision (d)(2) is, in effect, the more serious form of kidnapping. A defendant may be sentenced to a term of 25 years to life in state prison on the basis of a subdivision (d)(2) kidnapping alone. (§ 667.61, subd. (a).) A kidnapping within the meaning of subdivision (e)(1), and sections 207, 209 or 209.5 is, in effect, a less serious form of kidnapping. A defendant whose only sentencing circumstance is kidnapping within the meaning of subdivision (e)(1) is punished by 15 years to life in state prison. (§ 667.61, subd. (b).)

If the term "substantially" were removed from subdivision (d)(2) as respondent suggests, there would be no difference between that subdivision and subdivision (e)(1), at least when the subdivision (e)(1) allegation involved a kidnapping within the meaning of section 209. Nevertheless, the punishment for violating subdivision (d)(2) would be more severe than for violating subdivision (e)(1). The Legislature could not have intended such an outcome, and certainly not by implication.

2. The trial court used inapplicable jury instructions

As we have just explained, section 667.61, subdivision (d)(2) requires proof that "the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense." In addition, kidnapping within the meaning of subdivision (d)(2), like all forms of forcible kidnapping, requires that the movement of the victim be substantial in character. (*People v. Martinez*, *supra*, 20 Cal.4th 225, 235-236.)

CALCRIM No. 3175, the current Judicial Council of California Criminal Jury Instruction for the section 667.61, subdivision (d)(2) kidnapping sentencing factor, includes both requirements, telling the jury the People must prove the defendant moved the victim a substantial distance and "[t]he movement of _____<*insert name of alleged victim*> substantially increased the risk of harm to (him/her) beyond that necessarily

present in the ___ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>." The trial court did not use this instruction.

The court instructed the jury with CALCRIM No. 3179, which instructs the jury on the requirements of a true finding for kidnapping under subdivision (e)(1). That instruction directed the jury to "refer to the separate instructions [the court] will give you as to kidnapping. You must apply those instructions when you decide whether the People have proved this additional allegation."

The court's separate instruction was CALJIC No. 9.50, which is entitled "Kidnapping - No Other Underlying Crime (Penal Code § 207, subdivision (a).)" That instruction told the jury that in order to prove the offense of kidnapping, the People must prove (1) a person was moved by force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was "substantial in character." The instruction explained the term "substantial in character" as follows: "A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes."

3. The instructions given were insufficient

CALJIC No. 9.50 does not tell the jury the People must prove the movement of the victim increased the risk of harm, because that is not an element of the offense of simple kidnapping defined by the instruction. The instruction does tell the jury to consider whether the movement of the victim increased the risk of harm as part of determining whether the movement was substantial in character. The instruction also lists other factors for the jury to consider in determining the character of the movement. These factors are all listed in the disjunctive, which permits the jury to find the movement

of the victim to be substantial in character under the totality of the circumstances without finding *any* increase in the risk of harm to the victim.

The movement factors listed in CALJIC No. 9.50 are found in *People v. Martinez, supra,* 20 Cal.4th at p. 237. Because the character of the movement and the substantially increased risk of harm to the victim "are not mutually exclusive, but interrelated" (*People v. Rayford*, *supra,* 9 Cal.4th at p. 12), several of the *Martinez* factors related to the character of the movement are also relevant to a determination of whether the movement subjects the victim to a "substantially" increased risk of harm above and beyond that inherent in the underlying offense. (See *People v. Rayford*, *supra*, 9 Cal.4th at p. 13 [jury should consider "such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes"].) Thus, as respondent points out, the jury did have before it in CALJIC No. 9.50 the factors necessary to determine whether the movement "substantially" increased the risk of harm to the victim, although they are not identified as such. As we have explained, however, CALJIC No. 9.50 does not tell the jury the People must prove the movement increased the harm to the victim, substantially or otherwise. It lists all the factors in the disjunctive, permitting the jury to find the movement to be substantial in character under the totality of the circumstances without finding all the factors to be present. The presence of the *Rayford* factors in CALJIC No. 9.50 does not alter that analysis.[3]

4. Defendant was not prejudiced by the instructions

The omission of an element of a sentencing factor is harmless when the omitted element was uncontested and supported by overwhelming evidence, such that the jury

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[3] CALJIC No. 9.50 also fails to identify the baseline risk, which must be substantially increased for purposes of section 667.61, subdivision (d)(2). The instruction refers to "the increased risk of harm above that which existed prior to the movement." Section 667.61, subdivision (d)(2) requires an increased risk of harm above that inherent in the underlying sex offense.

verdict would have been the same absent the error. (*People v. Mil* (2012) 53 Cal.4th 400, 410.) That is the case here.

Defendant testified that he had consensual sex with the victims and was not involved in any sexual assault on them. His testimony as a whole was that all interactions between him and the victims were voluntary and consensual.

Although the prosecutor argued in his closing statement that the movement of Sara increased the risk of harm to her, defense counsel did not respond to this argument. Instead, defense counsel pointed to changes and inconsistencies in the victims' accounts of events and argued they were not credible about any aspect of the crimes.

Sara's account of events provided overwhelming evidence that her involuntary movement substantially increased the risk of harm above that inherent in the underlying sodomy. Defendant took Sara away from a public place where she was with friends to a dark and secluded area of an isolated parking lot, which by its nature decreased the likelihood of detection and increased defendant's ability to commit additional crimes. Undertaking the movement in a fast-moving car increased the risk of harm to Sara should she try to escape.

L.S.'s account of events also provided overwhelming evidence that her involuntary movement substantially increased the risk of harm above that inherent in the underlying sex offenses. First, defendant moved her from outside her apartment to inside it. This movement blocked defendant's assault from view, apparently muffled L.S.'s calls for help and confined her to a small area. This movement clearly decreased the likelihood of detection and increased defendant's ability to commit more crimes. It also meant that L.S. had to evade defendant in a small space before she could escape, which in turn increased the risk that defendant would physically harm her to keep her confined. L.S. was still able to escape from defendant's grasp within the main living area of the apartment. He next moved her to the smaller, more confined area at the foot of her bed near the bathroom and then into the still more confined bathroom. These smaller confined areas made it easier for defendant to control L.S.'s physical movements, and prevent her escape. This increased control enhanced defendant's ability to commit more

crimes. By making escape still more difficult, the movement decreased the risk of detection and increased the risk of harm to L.S. from an escape attempt.

Given defendant's reliance on consent and lack of credibility defenses and the overwhelming evidence that the movement of the victims substantially increased their risk of harm, the failure to instruct the jury as to the substantial increase of harm element of section 667.61, subdivision (d)(2) was harmless beyond a reasonable doubt. (*People v. Mil*, *supra*, 53 Cal.4th at pp. 410-411; *Neder v. United States* (1999) 527 U.S. 1, 17.)

C. The Consecutive Sentences on Counts 2, 3, 4 and 5 Are Not Authorized

The trial court imposed four 25-year-to-life sentences for the counts 2 through 5 sex offenses defendant committed against L.S. Defendant contends that under the version of the One Strike law in effect in 2002 when he committed his sexual offenses, the trial court could properly impose only one 25-year-to-life sentence for those four counts. Respondent concedes that defendant is correct. We agree.

In 2002, section 667.61 subdivision (g) provided: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." (Stats. 1998, ch. 936, § 9, p. 6876.)

Under this version of the One Strike law's consecutive sentencing provision, "sex offenses occur[] on a 'single occasion' if they were committed in close temporal and spatial proximity." (*People v. Jones* (2001) 25 Cal.4th 98, 101, 107 [offenses occurred on a single occasion when defendant raped, sodomized and forced his victim to orally copulate him in the backseat of a vehicle over the course of an hour and a half] (*Jones*); see *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343 [three rapes occurred on a "single occasion" then they took place within an hour inside the confines of two rooms in the victim's residence] (*Fuller*).)

Here, defendant's sexual offenses against L.S. took place inside her studio apartment over a period of about an hour and a half. Thus, they took place in close temporal and spatial proximity within the meaning of *Jones*, *supra*, 25 Cal.4th 98, and former subdivision (g) of section 667.61. Only one 25-year-to-life sentence was permissible. Defendant must be resentenced on the other three counts "as authorized under any other law, including section 667.6, if applicable." (Stats. 1998, ch. 936, § 9, p. 6876.)

D. Defendant's Right to a Jury Trial

Defendant contends that if we reject his claim that consecutive sentences are not authorized under *Jones*, *supra*, 25 Cal.4th 98, and *Fuller*, *supra*, 135 Cal.App.4th 1336, the matter must be remanded for a jury trial to determine whether he committed the four sexual offenses against L.S. on a single occasion within the meaning of former subdivision (g) of section 667.61. We have found *Jones* and *Fuller* applicable, and so we need not and do not reach defendant's claim that a jury is required to make this determination.

E. Sufficient Evidence Supports the Section 12022.7 Allegation

Defendant contends there is insufficient evidence to support the true finding on the allegation that he inflicted great bodily injury on L.S. in the commission of the count 6 robbery within the meaning of section 12022.7. He contends he inflicted great bodily injury on L.S. before and during the commission of the counts 2 through 6 sexual offenses but not during the robbery, and so the true finding on the section 12022.7 allegation is not supported by constitutionally substantial evidence.

1. Scope of Section 12022.7

Section 12022.7, subdivision (a) provides, "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

The phrase "in the commission of a felony" has been broadly construed to involve conduct before, during and after the completion of the felony. (*Jones*, *supra*, 25 Cal.4th

at pp. 109-110 [discussing this phrase in the section 12022.3 weapons use enhancement].) The focus in not on the chronology but on the relationship between the weapons use and the underlying felony. (*Jones*, at pp. 109-110.)

The Legislature intended section 12022.7 to be applied broadly. (*People v. Cross* (2008) 45 Cal.4th 58, 66, fn. 3.) Accordingly, we give the phrase "in the commission of a felony" in section 12022.7 the same broad construction it has been given in other enhancements, and hold that it includes injuries inflicted before, during or after the technical completion of the underlying felony, as long as the infliction of the injury is related to that felony.

2. Sufficiency of the evidence review

We review the sufficiency of the evidence in the light most favorable to the judgment and in accordance with the usual rules on appeal, as set forth in section A above.

3. Defendant inflicted additional, separate injuries during the robbery

L.S.'s statements to Detective Moss, made near the time of the crimes, show that the sexual assaults were over before defendant began the robbery and additional injuries were inflicted during the robbery. L.S. told him that the anal penetration occurred next to her bed, and the other three forcible sex acts took place in the bathroom. Defendant told her to stay in the bathroom. She then saw defendant handling a lot of her property and rummaging through her belongings in the main living area. She twice tried to flee, but defendant caught her both times and punched and kicked her, injuring her in the rib area. He also choked her once, causing her to lose consciousness. He took money out of her purse. She did not describe any sexual acts after the robbery to Detective Moss.

L.S.'s testimony at trial also placed the kicking which broke her ribs during the separate robbery. While in the bathroom alone, L.S. heard defendant rummaging around in the living area of her apartment. When she left the bathroom in the mistaken belief that defendant was gone, defendant began hitting, choking and kicking her. L.S. testified that she felt her ribs break from one of these kicks. L.S. told him to take her money, in

the hopes that he would stop beating her and leave. Defendant found and took L.S.'s money. She testified that he sexually assaulted her again.

Taken as a whole, L.S.'s account of events shows that her ribs were broken after defendant stopped his sexual assaults and began looking for money or other valuables. When she inadvertently interrupted this search, he beat her, breaking her ribs and choking her into unconsciousness. Once L.S. was too injured to escape, defendant continued his search for her money. This chronology demonstrates that defendant inflicted great bodily injury during the robbery, and the infliction was related to the robbery. This is sufficient evidence to support the true finding on the section 12022.7 allegation.

Since we have determined that "a rational trier of fact could have found the essential elements of the [allegation] proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15 of the California Constitution." (*People v. Osband*, *supra*, 13 Cal.4th at p. 690.)

F. Section 654 Does Not Require Staying the Section 12022.7 Term

The trial court added an enhancement for great bodily injury within the meaning of section 12022.8 to each of defendant's sentences for the counts 2 through 5 sexual assault convictions and also added an enhancement for great bodily injury within the meaning of section 12022.7 to the count 6 robbery conviction. Defendant contends the trial court should have stayed the section 12022.7 great bodily injury enhancement pursuant to section 654, because any great bodily injury inflicted during the robbery was inflicted with the same objective and as part of the same continuous course of conduct as the sexual assaults and associated great bodily injury.

1. Section 654 and substantive offenses

Section 654 provides, in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (Subd. (a).)

Section 654 bars multiple punishments for convictions arising out of an indivisible course of conduct committed pursuant to a single criminal intent or objective. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Section 654 does not bar multiple punishment for multiple objectives in an indivisible course of conduct. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.)

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. . . .' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

2. Section 654 and enhancements

Section 654 can apply to enhancements. (*People v. Ahmed* (2011) 53 Cal.4th 156, 163-165 (*Ahmed*).) Our colleagues in the Third District Court of Appeal have considered whether a section 12022.7 enhancement may be applied to multiple substantive offenses. (*People v. Wooten* (2013) 214 Cal.App.4th 121 (*Wooten*).) They have held that since section 654 does not bar separate punishment for multiple criminal acts which are divisible because they reflect separate intents, objectives, or events, then section 654 does not apply to an enhancement which attaches to those offenses. (*Wooten*, at p. 130.)

The *Wooten* court recognized that, "'enhancement provisions do not define criminal acts; rather, they increase the punishment for those acts. They focus on *aspects* of the criminal act that are not always present and that warrant additional punishment.' (*Ahmed, supra,* 53 Cal.4th at p. 163.)" (*Wooten, supra*, 214 Cal.App.4th at p. 130) Thus, "[a] sentence enhancement relates to an aspect of the substantive offense to which it attaches, not to other similar enhancements for separate criminal acts. (See *Ahmed, supra,* 53 Cal.4th at p. 163.)" (*Wooten,* at p.130.) Accordingly, "the same type of enhancement may be imposed for each substantive offense committed with differing intent or for a different purpose. So long as the conduct giving rise to the convictions of

separate substantive offenses is divisible or arises from separate criminal acts, neither section 654 nor *Ahmed, supra,* 53 Cal.4th 156, requires the staying of the attached enhancements." (*Wooten, supra,* 214 Cal.App.4th at p. 131.)

3. Defendant's assaultive conduct was related to the robbery

We find the reasoning of *Wooten* applicable here, particularly since the evidence in this case shows that separate injuries were inflicted in the two separate sets of offenses. Defendant initially subdued L.S. by punching her in the face, resulting in copious bleeding and a possible broken nose. This facilitated his commission of the sexual offenses and supports the imposition of the section 12022.8 enhancement terms. After L.S. had a brief break in the bathroom, while defendant was searching the apartment for money or valuables, the injuries were no longer subduing L.S. and she was able to attempt an escape. Defendant interrupted his search to kick L.S. in the ribs with such force that she could fell the ribs breaking, and to choke her into unconsciousness. This prevented her escape and facilitated the robbery and supports the imposition of the section 12022.7 enhancement term. Section 654 does not require a stay.

DISPOSITION

The 25-year-to-life terms imposed on counts 2 through 5 are ordered vacated. The matter is remanded to the trial court to determine on which single count to impose the 25-year-to-life term, and then to resentence defendant on the remaining three counts as authorized under any other law. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.